

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 815 of 2003****For Approval and Signature:****HONOURABLE MR.JUSTICE J.R.VORA****HON'BLE SMT. JUSTICE ABHILASHA KUMARI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT**Versus****MOHAN RAMBHAI KAMALIYA & ORS**

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Appearance :

MR KC SHAH APP for Appellant

MR HRIDAY BUCH for Respondents No. 1, 2 & 3

MR ZUBIN F BHARDA for Respondent No. 4

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA**and****HON'BLE SMT. JUSTICE ABHILASHA KUMARI****Date : 29/08/2007**

ORAL JUDGMENT : (Per : HONOURABLE MR. JUSTICE J.R. VORA)

1 Instant Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure, against the judgment and order rendered by learned Additional Sessions Judge, District – Junagadh, on 1st of August, 2002, in Sessions Case No.45 of 2001, whereby all the present four respondents, being accused of the said Sessions Case, came to be acquitted by the Trial Court, for the offences punishable under Sections 302, 394, 201, 120(B), 34, 411 and 114 of the Indian Penal Code.

2 Learned APP Mr. K.C.Shah for the State, learned Advocate Mr. Hirday Buch for respondents No. 1, 2 and 3 and learned Advocate Mr. Zubin F. Bharda for respondent No. 4 were heard. Leave to Appeal is granted. Appeal is admitted.

3 Learned counsels appearing in the Appeal requested this Court to hear the Appeal finally as the Record and Proceedings of the Trial Court are available with this Court and that they shall provide extra copies of the evidence recorded during trial and the documents produced on record. Request is granted and the matter is heard finally.

4 According to the facts of prosecution case accused Nos.1 and 2 had committed murder of Bharwad Lakhabhai Ambabhai, who was resident of village Rohika of Dholka taluka. Bharwad Lakhabhai was the Driver of Truck No. GJ-1-TT-9870, belonging to one Jagadishgiri Mohangiri Goswami, resident of Baroda. The truck was plying between Kodinar Ambuja Cement Factory to Ahmedabad for shifting cement from the factory through one transport company named as “Jeel Transport Co.” belonged to Ahmedabad. Accused No.1 Mohan Rambhai Kamaliya was also a Driver in Truck No. GJ-12-V 7338 and the said truck was also plying in Ambuja Cement Company and, therefore, he knew deceased Bharwad Lakhabhai Ambabhai. On 20.1.2001, according to prosecution case, deceased Lakhabhai Bharwad came to Kodinar at Ambuja Cement Factory from Ahmedabad for loading cement in his Truck No. GJ-1-TT-9870. At that time, accused No.1 Mohan Rambhai Kamaliya along with accused No.2 Kishor Mohanbhai Makwana had been to the cement factory for the settlement of his account from witness Karshan Jethabhai about the truck accused No.1 was plying earlier. Accused Nos. 1 and 2 stayed in Paratha House belonging to one Parshottam Bapu, and said Paratha House was situated near the office of Raj Moti Transport. On the next day, accused No.1 left Paratha House stating that he was going to Karshan Jethabhai to settle the accounts and returned to Paratha House

at 6.00 a.m. in Truck No. GJ-1-TT 9870 along with deceased Lakhabhai Barward. Accused No.1 Mohan Rambhai Kamaliya thereafter introduced accused No.2 Kishor Mohanbhai Makwana to the deceased and deceased had been to Ambuja Cement factory for loading the truck and came out of the factory at 4.30 p.m. and halted near Paratha House. At that time, accused No.1 Mohan Rambhai Kamaliya and accused No. 2 Kishor Mohanbhai Makwana were sitting on a cot near Paratha House. Parking his truck near Paratha House, deceased went to the office of Ambuja Cement for collecting papers. At that time, accused Nos. 1 and 2 both conspired together to cause murder of Lakhabhai Bharwad and to rob the cement loaded in his truck and to implement this conspiracy, both the accused Nos. 1 and 2 boarded in the truck along with deceased Lakhabhai Bharwad at 10.30 p.m. and sat in the cabin of the truck. When the truck reached near Veraval at bye-pass road, they took supper and when they reached near village Kanaja, they halted to take tea and thereafter they proceeded ahead. When they proceeded further from Kanaja, the accused No.1 started driving the said truck, accused No.2 was sitting near him, while deceased Lakhabhai Bharwad was sitting on left side door of the cabin of the truck. When this truck at 2.00 a.m. reached near Dilavar Nagar, accused Nos. 1 and 2 started implementing their conspiracy and intentionally accused No.1 stated that there was something wrong in the mechanism of the truck and some

noise was coming. Therefore, deceased leaned from the window to ascertain whether there was anything wrong in the truck. At that time, according to the instructions of the accused No.1 Mohan Rambhai Kamaliya, accused No.2 took one iron rod and inflicted one blow on the back side of the head of the deceased. Deceased had fallen down from the cabin of the truck and, thereafter, the truck was halted nearby. Thereafter both accused Nos. 1 and 2 got down from the truck and inflicted more blows by iron rod and wooden log on the body of the deceased and they inflicted at about 10 to 15 blows. Accused No.2 caught hold of the legs of the deceased and accused No.1 throttled deceased. Both of them thereafter snatched cash and the papers from the pocket of the deceased. Thereafter accused Nos. 1 and 2 travelled upto village Vadla in the said truck along with dead body of deceased. They washed their clothes, which were bloodstained at village Vadla and thereafter they went to Dhanfuliya village and changed their clothes. Shoes of the deceased were thrown in waste land and with intention to destroy the evidence, the dead body of the deceased, was thrown on railway track from the Bridge of Shahpur village. From there in truck, accused Nos. 1 and 2 came near railway crossing of village Vadla and near a petrol pump situated there, the accused burnt and destroyed papers and diary found from the pocket of the deceased. Both the accused Nos. 1 and 2 thereafter in the truck came to village

Timbavadi and where they met accused No.3 Gopal Ramjibhai Makwana and with the abatement of accused No.3, cement which was loaded in the truck was unloaded and was stored in the house of accused No.4 Ramji Nathubhai Vaja. Thereafter, unloading the truck, accused Nos. 1 and 2 came to Amreli Chalala road and abandoned the truck on the road. From there, both the accused hired one rickshaw and came to Bagasara and from there they came to Junagadh. On 21st of January, 2001, Maganbhai Sangrambhai, Mukadam of Railway Station of Shapur, informed Deputy Superintendent that Engine Driver of the train, which was passing in the early morning, had conveyed that one dead body was noticed by him near railway over-bridge at Shahpur. In pursuance of this information, Maganbhai was directed to make inquiry. Maganbhai found the dead body of the deceased on railway track, which was crushed and, prima facie, it appeared that, the death was caused on account of accident with the train. Deputy Superintendent Madhusudan Tuljashankar Pandya was informed and after preparing one Yadi, Mukadam Maganbhai Sangrambhai was sent to Vanthali Police Station for declaring this incident before police. Vanthali Police registered the incident as Accidental Death Case No.2 of 2001 and In-charge PSI Shri Joshi, conducted this inquiry. In the meantime, PSI S.N. Mehta of Striking Force of the Junagadh received information on 28th of January, 2001 that in village Timbavadi of Junagadh one stolen

stock of cement was stored and, therefore, he conducted a raid in the house of accused No.4 Ramji Nathubhai Vaja and seized the stock of cement along with those stock of cement, accused No.3, accused No.4 and one more person named as Nilesh Nathu, were also found and proceedings were started against them according to Section 41(1)(d) of the Criminal Procedure Code, and those three persons were arrested. In inquiry, it was found that the stock of cement was sold by accused No.1 Mohan Rambhai Kamaliya and accused No.2 Kishor Mohanbhai Makwana to accused Nos. 3 and 4 in much lesser price. During investigation, on 28th of January, 2001, accused No.2 Kishor Mohanbhai Makwana was found from village Dhanfuliya and PSI Mehta inquired from him and he stated that along with accused No.1 they had caused death of Lakhabhai Bharwad and had stolen the cement from the truck, so the crime came to be registered at Vanthli Police Station vide Crime Register No. 13 of 2001 against present respondents for above said charges. It appears that FIR came to be registered of accused No.1. In-charge Circle Police Inspector of Manavdhar investigated the offence and thereafter Vanthli Police Station PSI Mr. M.V. Parmar took the charge of investigation. Ultimately, a charge sheet came to be filed against all the four respondents on 23rd of April, 2001 in the Court of Judicial Magistrate, First Class, at Vanthli Police Station for the above said offences, which was registered as Criminal Case No. 239 of 2001.

The case was committed to the Court of Sessions and where it was registered as Sessions Case No. 45 of 2001. Charge was framed against the respondents vide Exhibit – 1 by learned Additional Sessions Judge on 10th of April, 2002 and was read over to the respondents. Each of the respondents pleaded not guilty to above charges.

5 The prosecution, therefore, examined as many as 55 witnesses to prove its case and produced on record 45 documents. The learned Trial Judge recorded this voluminous evidence and thereafter recorded the statements of each of the respondents under Section 313 of the Code of Criminal Procedure and the defence of each of the respondents was of total denial. After hearing the prosecution as well as defence, Trial Court came to the conclusion to acquit all the respondents and, hence, this Appeal by the State.

6 Learned A.P.P. Mr. K.C. Shah on behalf of the State, learned Advocate Mr. Hirday Buch and Mr. Zubin F. Bharda for the respondents were heard in great detail in respect of this Appeal.

7 Having heard rival contentions and having gone through each corner of the record and proceedings, we have considered in great detail vital features of the matter. We have taken into consideration

reasonable probabilities arising out of the evidence recorded during the trial. We have taken into account evidence of each of the witnesses recorded during trial and the documents produced on record. Though this is an appeal against the acquittal, we have re-appreciated the evidence independently and we have scanned carefully the findings arrived at by the Trial Judge with reference to re-appreciation of the evidence undertaken by us.

8 The whole prosecution case rests on circumstantial evidence. Prosecution proposes to establish the case against all the four respondents by the circumstances found during the evidence and recorded before the court in shape of the deposition and the documents produced. So far as the death of the deceased is concerned, there is no dispute that the same was homicidal death. This fact is established by the prosecution beyond doubt by PW-14 Jamnadas Chhaganlal Ladani, who conducted postmortem of the deceased. He conducted postmortem on 21.1.2001 in pursuance of yadi which he received, and in pursuance of inquest panchnama forwarded with yadi. He narrated injuries in Column-17 of postmortem note, which is placed on record at Exhibit-42. He narrated the corresponding internal injuries in his postmortem note placed at Exhibit – 42. He opined that all the injuries were anti-mortem and the death was on account of multiple injuries on

the skull of the deceased and on account of fractures of the skull. The injuries were caused, according to Doctor, by hard and blunt substances.

9 Prosecution proposed to prove the crime of the respondents by following eight circumstances by which according to the prosecution it was established that accused Nos. 1 and 2 caused murder of deceased Lakhabhai Bharwad and accused Nos. 3 and 4 were liable to store the stolen muddamal of cement. It is also the case of the prosecution that after causing murder of deceased Lakhabhai Bharwad, accused Nos. 1 and 2 had stolen the cement loaded in the truck. The circumstances which were relied on by the prosecution, can be summarised as under :

- i) The circumstances of last seen together i.e. accused Nos. 1 and 2 were seen along with the deceased near cement factory at Kodinar, thereafter at Paratha House and thereafter at tea stall on the night of incident.
- ii) The evidence in respect of destroying all papers and diary by accused Nos. 1 and 2 near petrol pump at Vadla crossing.

- iii) Evidence by which it is established that accused Nos. 1 and 2 thrown the dead body of deceased Lakhabhai Bharwad from over-bridge of railway track near Shahpur.
- iv) The evidence of disposal of cement loaded in the said truck by accused Nos. 1 and 2 to accused Nos. 3 and 4.
- v) Evidence of disposal of shoes of the deceased by accused Nos. 1 and 2.
- vi) Disposal of the stolen truck No. GJ-1-TT-9870, by accused Nos. 1 and 2, which was in possession of the deceased Lakhabhai Bharwad.
- vii) Panchnama prepared by the Investigating Agency, by which both the accused demonstrated that how they committed the crime.
- viii) Forensic Science Laboratory evidence and witnesses of Forensic Science Laboratory.

behalf of the State that, the charges levelled against each of the respondents are amply proved and that the judgment and order of acquittal in question requires to be interfered with. While on behalf of the respondents, it has been argued that in the case resting on the circumstantial evidence, it becomes the duty of the prosecution to prove each link of circumstances, which leads to a chain, leading to the crime committed by the accused. It is submitted that not a single link of any circumstance could be established by the prosecution against any of the accused and, therefore, no interference is warranted in the order impugned in this Appeal.

11 We have re-appreciated the evidence and each circumstances proposed by the prosecution to establish the case against all the respondents through the circumstantial evidence.

12 Very first circumstance is in respect of last seen of the accused and deceased together on 21.1.2001 at Ambuja Cement factory and thereafter. Though it is proved through PW-1 Haribhai Varsinhbhai, examined at Exhibit 101, that on that day i.e. 20.1.2001, deceased Lakhabhai Bharwad loaded his truck with cement from cement factory at Kodinar and, thus, the said truck was to be taken at Ahmedabad and the cement was to be unloaded there. Except this, the fact of last seen

together of the accused and deceased could not be established by the prosecution through circumstantial evidence. PW-24 witness Dayalgar Jivangar, examined at Exhibit – 67, did not support the prosecution case that accused Nos.1 and 2 had stayed overnight in his lodging house, named as Giriraj, situated near Ambuja Cement factory. It was not supported by this witness that on next day both the accused boarded in Truck No. GJ-1-TT 9870 along with deceased Lakhabhai Bharwad. PW-43 Virambhai Hathiyabhai, who was Manager of the said lodging house, was also examined at Exhibit – 96, but he also did not support the fact that he had seen accused Nos. 1 and 2 along with the deceased on 21st of January, 2001 and both the witnesses denied the fact that on 19.1.2001 accused Nos. 1 and 2 stayed overnight in their lodging house and had taken supper. Both the witnesses denied to have known accused No. 2 Kishor Mohanbhai Makwana and stated that they knew accused No.1 Mohan Rambhai Kamaliya only. Prosecution in this respect has also examined PW-44, Exhibit – 97 witness Jagadish Hajabhai, who was also a servant in the lodge owned by witness Dayalgar Jivangar, but he has also not supported the prosecution case. Going further, the prosecution examined PW-45 Amrutlal Jamnadas, vide Exhibit-98, to prove that near the bye-pass road of Veraval town, in Paratha House, accused Nos. 1 and 2 and deceased were seen together by this witness but this witness also did not support the prosecution case and stated

that he neither knew deceased Lakhabhai Bharwad nor any of the accused and he had not seen any of them at the Paratha House. PW-36 Ramesh Virambhai is also examined at Exhibit - 84 in this respect that near village Kanaja both the accused Nos. 1 and 2 and the deceased took tea at the tea stall named as 'Jai Mataji'. This stall belonged to PW-36 Ramesh Virambhai, and it is the prosecution case that, deceased and accused Nos. 1 and 2 were seen at the said tea stall after the Paratha House. Witness Rameshbhai Virambhai, examined at Exhibit – 84 did not support the prosecution case and stated that he had never seen those three persons together at his tea stall. The prosecution though examined PW-49 Shamla Menandbhai, who stated before the court that on the day of the incident at his pan beedi cabin, which was situated near village Kanaja, accused Nos. 1 and 2 and Lakhabhai Bharwad had come. He stated that at his cabin accused Nos. 1 and 2 took tea and had boarded in truck of Jeel Transport Co. and had gone away. In his examination in cross, he admitted that his cabin was situated on highway road and he could not say that on particular day which person had visited his cabin. He denied that at the behest of the police, he deposed before the court that accused Nos. 1 and 2 had visited his cabin. He admitted that he did not know deceased Lakhabhai and he did not know that how the person was looking and he belonged to which village. He stated that, he could not say that, what was the name of the

father of deceased Lakhabhai. He admitted in his cross-examination that he had never known or met Lakhabhai earlier and never had any kind of talk with him. Appreciating the evidence of this witness, the learned Trial Judge came to the conclusion that this witness was not reliable as he failed to establish that he did know deceased Lakhabhai and unless it is established that he knew deceased Lakhabhai very well, it was not possible for the witness to state that he knew Lakhabhai, who had visited his pan-beedi cabin situated on highway at Kanaja along with accused Nos. 1 and 2. The learned Trial Judge further observed that it was not a case of stray incident which could be remembered by the witness, but the cabin was situated on the high way, on each day, according to the witness, many trucks and many persons were visiting his cabin and, therefore, the learned Trial Judge came to the conclusion that the evidence of this witness was not beyond doubt. On appreciating independently the evidence of this witness, we also come to the conclusion that this witness is not reliable to establish the fact that accused Nos. 1 and 2 and the deceased were last seen together at his pan-beedi cabin and took tea. When the witness did not know deceased Lakhabhai Bharwad, it was not possible for him to state that it was deceased Lakhabhai Bharwad who had visited his cabin along with accused Nos. 1 and 2 to take tea. Noteworthy it is that, no description at all of deceased Lakhabhai could be given by this witness to recognise

the deceased, who allegedly had visited the cabin of this witness. Thus, so far as the first circumstance of last seen together of accused Nos. 1 and 2 along with the deceased is concerned, from the above appreciation of evidence, it is clearly established that the prosecution has failed to establish this link against the accused in the chain of circumstantial evidence.

13 The second circumstance which is proposed by the prosecution is in respect of destroying the papers and diary recovered by accused Nos. 1 and 2 from the pocket of the deceased. It is the prosecution case that near Vaishali Hotel and near cabin of one Jayantibhai at Vadla Railway crossing, in a bonfire, accused Nos. 1 and 2 destroyed papers and diary recovered from the dead body of the deceased. For establishing this fact, prosecution has examined PW-9 Najabhai Bhimabhai, Exhibit-33, and PW-15, Exhibit – 45 Maganbhai Ramjibhai. According to prosecution case, in the presence of these witnesses, in a bonfire, accused Nos. 1 and 2 destroyed the said diary and the papers. Witness Najabhai Bhimabhai, Exhibit – 33, and Maganbhai Ramjibhai – Exhibit – 45 turned hostile and did not support the prosecution case. They denied that accused Nos. 1 and 2 had come near the hotel owned by Jayantibhai on one Spark Moped bi-cycle and destroyed diary and papers putting the same in the fire. This link also

therefore could not be established by the prosecution beyond doubt.

14 The third circumstance which prosecution proposed to establish is in respect of throwing of dead body by accused Nos. 1 and 2 from the truck on railway track from over bridge near village Shahpur. In this respect, it is also the prosecution case that, after that, both the accused washed their clothes at their house and thereafter they changed those clothes. The prosecution examined PW-20 Exhibit – 63 Mithiben Mohanbhai and she happened to be mother of accused No.2 Kishor Mohanbhai Makwana. It is the prosecution case that accused No.2 came to his house on the night of the incident with wet clothes and changed his clothes. However, witness Mithiben Mohanbhai did not support the prosecution case that accused No.2 Kishor Mohanbhai had changed his clothes on the day of the incident. Same way, PW-17 Exhibit – 47 Bhanuben Sujabhai, being sister of the mother of accused No.2, was also examined by the prosecution to establish this fact, but she also turned hostile and did not support the prosecution case. PW-18, examined at Exhibit-48, Jyotsnaben Mohanbhai, wife of accused No.1, examined by the prosecution also turned hostile. She was examined to prove the fact that accused No. 1 had been to the house of witness Bhanuben and after saying that he was going to unload the truck, had taken Spark motorcycle and had gone on that motorcycle, but witness Jyotsnaben did

not support the prosecution case and was turned hostile. It was the prosecution case that accused No.1 had given Rs. 1,500/- to witness Jyotsnaben and police seized remaining amount of Rs. 1,325/- from her as muddamal, but this fact is also not supported by witness Jyotsnaben. Therefore, the fact that both the accused Nos. 1 and 2 had thrown the dead body of the deceased on the railway track and thereafter washed their clothes and changed wet clothes and out of the amount received from selling stolen stock of cement, accused No.1 gave Rs. 1,500/- to his wife Jyostnaben, could not be established by the prosecution beyond reasonable doubt. This link also remains not proved by the prosecution in the chain of circumstantial evidence.

15 The fourth circumstance prosecution proposed to establish the crime of the accused Nos. 1 and 2 is the circumstance of disposal of stolen cement which was loaded in the truck No. GJ-1-TT-9870. In this respect, it is the prosecution case that for disposal of cement, accused Nos. 1 and 2 contacted one Hanifbhai Daudbhai of village Vadla. Brother-in-law Ramji Nathu had introduced accused No.1 to Hanifbhai Daudbhai, to whom it was represented that accused No. 1 had cement of Ambuja cement factory, which accused No.1 intended to sell with lessor price, but Hanifbhai Daudbhai refused to buy the said cement. This witness Hanifbhai Daudbhai is examined as PW-21 at Exhibit – 24

and he did not support the prosecution case. PW – 16, Exhibit – 46 Satishbhai Veljibhai examined by the prosecution also turned hostile who was examined to prove the fact that the witness knew that the accused No. 1 had taken a spark motorcycle from his house and he had murdered one Bharwad. It was the prosecution case that accused Nos. 1 and 2 kept spark motorcycle with one Anvarkhan Mahmmadkhan. This witness Anvarkhan Mahmmadkhan is examined as PW-19, Exhibit – 49, but the witness stated that it had not happened that both the accused Nos. 1 and 2 had kept Spark moped motorcycle with them. Afterwards, though, he came to know that the accused Nos. 1 and 2 had murdered one Lakhabhai Bharwad. Therefore the fact could not be proved by the prosecution that accused Nos. 1 and 2 took spark motorcycle vehicle from village Dhanfuliya and negotiated about selling of the stolen cement. This link also could not be established by the prosecution.

16 The fifth circumstance which prosecution proposed to establish against accused Nos. 1 and 2 to connect them with the crime is the circumstance of disposal of the shoes of the deceased by accused Nos. 1 and 2. It is the prosecution case that both the accused disposed of those shoes near village Vadla. In this respect, the Investigating Officer had drawn two panchnamas which are placed on record at

Exhibits 19 and 20. Exhibit – 19 is the panchnama by which accused No.2 gave information before the police that he was willing to discover shoes of the deceased which he had thrown near the sim of village Vadla. The panchnama was drawn on 29.1.2001 between 15.30 and 16.30 hours. Panchas of the panchnams were Dilipbhai Sidikbhai and Kalidas Nanjibhai. Both these panchas are examined at Exhibit-18 as PW-2 and PW-3 at Exhibit–21. PW-2 Dilipbhai Sidikbhai did not support panchnama at Exhibit -19 at all. Both these panchas were also panchas of panchnama at Exhibit-20 by which accused No.1 gave information before the panchas that he had concealed the clothes which he had worn at the time of incident and was willing to discover those clothes. According to the prosecution case, in the presence of panchas, from the house of accused No.1, those clothes were discovered. However, panch of this panchnama - Exhibit–18 Dilipbhai Sidikbhai did not support, but second panch of these panchnams at Exhibits-19 and 20 examined at Exhibit– 21 Kalidas Nanjibhai attempted to support the prosecution case. From his evidence, it appears that, he stated that simultaneously shoes and clothes were recovered by the police in their presence and not one by one. According to this witness, accused Nos. 1 and 2 both were taken together once only at Village Vadla and shoes as well as clothes were recovered. It is the prosecution case that panchnama Exhibit-19 was drawn first and then they came to police station and

thereafter panchnama Exhibit – 20 again was drawn by which allegedly clothes were recovered. The witness admitted in his cross-examination that in his presence the panchnama was not drawn, but the panchnama was ready, in which he subscribed his signature and, thus, this witness is not reliable and, therefore, panchnama of discovery of shoes of the deceased and the clothes worn by accused No. 1 at the time of incident could not be proved by the prosecution, and these panchnamas are placed on record at Exhibit–19 and Exhibit – 20 could not be proved. The fact, therefore, could not be established by the prosecution that in the presence of panchas, accused No. 2 discovered shoes of the deceased and accused No.1 discovered clothes worn by him at the time of the incident. This circumstance of the discovery also could not be proved, as above discussed, by the prosecution and this link of the chain is also not established by the prosecution.

17 The sixth circumstance which prosecution proposed to establish is in respect of disposal of truck by accused Nos. 1 and 2 by abandoning the said Truck No. GJ-1-TT-9870 at Amreli Chalala road. A panchnama, placed on record at Exhibit – 23, was drawn and according to police, on 29.1.2001, in the presence of panchas Yusufbhai Mahmmadbhai and Bhaveshbhai Nanalal, accused No.1 led police and panchas where the truck was abandoned. From the said truck,

muddamal article Nos. 18 to 27 i.e. iron rod, wooden log, etc according to prosecution case were seized. Panch - PW-4 Yusufbhai Mahmmadbhai, examined at Exhibit – 22 did not support the panchnama at all. According to him, he and other panch Bhaveshbhai Nanalal were called at Vanthli Police Station and his signature was obtained on ready panchnamas and other muddamal slips. Panch Bhaveshbhai Nanalal, PW-25, examined at Exhibit – 68, attempted to support the prosecution case and stated that preliminary panchnama was drawn at Vanthli Police Station where accused No.1 was present, who led panchas, police and FSL Officers to the truck. There were blood marks in the truck and other articles were seized by the police. In his cross examination, he admitted that one Sejabhai, Head Constable, had called him for acting as a panch. In his cross-examination he stated that he knew Police Constable Sejabhai because he was staying near police colony. It is the say of the witness that he was called from bus stand. When he was cross-examined searchingly that why he was present at the bus stand, it was transpired that the witness deposed falsity. He admitted that he did not know accused No.1 Mohan Rambhai Kamaliya earlier, but he was introduced to the accused No.1 by police. It appeared that this panch was thickly connected with the police. When by the evidence of the Investigating Officer and other panchas, the panchnamas could not be proved beyond doubt, no reliance can be placed on this witness,

who is found thickly connected with the police for the recovery of the truck and other articles. His evidence is not inspiring the confidence, firstly, because instead of randomly, this panch appears to have been selected by the police particularly, and that he was not able to justify his presence near the bus stand from where he was called by the police. His only evidence, not supported by other pancha and other circumstance, is the weakest kind of evidence for the recovery and cannot be believed. Thus, the circumstance of recovery of the truck, at the instance of the accused, is not proved by the prosecution beyond reasonable doubt.

18 The seventh circumstance which the prosecution proposed to rely is in respect of one demonstrative panchnama placed at Exhibit – 28. It is the prosecution case that in presence of panchas Sureshbhai Premchandbhai and Bhavinbhai Girishbhai and in the presence of Executive Magistrate, accused Nos.1 and 2 demonstrated that how they committed the crime, wherein statements of the accused Nos. 1 and 2 were recorded in the form of confession that how they committed the crime. This panchnama is against the principle of law as laid down by Sections-25 and 27 of the Indian Evidence Act. Moreover, panch witnesses PW-6, Exhibit–27 Sureshbhai Premchand and PW-7 Exhibit–29 Bhavinbhai Girishbhai both did not support the panchnama and,

therefore, this link also could not be proved by the prosecution.

19 The eight circumstance which the prosecution proposed to advance to prove the guilt of the accused is in respect of Forensic Science Laboratory report and analysis of Serological Department of FSL. Those reports are produced at Exhibits 59 to 62. When, as aforesaid, main witnesses are not supporting the prosecution case as to the circumstances appearing against the accused, merely the reports of Forensic Science Laboratory or Serological analysis cannot be helpful to the prosecution case. Those reports pertain to the analysis and scientific examination of muddamal sent to the Forensic Science Laboratory, but it is not proved by the prosecution beyond the doubt that those muddamal was connected with any of the accused. However, from the reports of Forensic Science Laboratory and from the analysis of Serological Department, it could not be concluded that the blood group of deceased was found on the clothes of the accused or any of the finger prints of the accused Nos. 1 and 2 were found, incriminating accused Nos. 1 and 2. This evidence is not useful to the prosecution case and, hence, this last circumstance also is not proved and established by the prosecution as a link of the chain of circumstantial evidence.

20 It is the prosecution case that accused Nos. 1 and 2 sold the

stolen cement to accused Nos. 3 and 4 and through accused No.4 Ramji Nathubhai Vaja, the cement was stored in the house of one Bhikhabhai Arjanbhai and one Bhikhabhai Lakhabhai. Both these witnesses Bhikhabhai Arjanbhai and Bhikhabhai Lakhabhai are examined at Exhibit 65 and Exhibit – 85. Both these witnesses have turned hostile and they stated that in their presence no such stock of cement was stored in their house and such stock was stored by the Police in their presence. Therefore, the charges against accused Nos. 3 and 4 in respect of Section 411 of the Indian Penal Code also could not be proved by the prosecution. Seizure panchnama of stock of cement as produced by the prosecution at Exhibit – 31 also could not be proved by the prosecution. Panch of the said panchnama examined at Exhibit – 30 Rafikbhai Abdreman did not support the prosecution case.

21 Thus, it appears that the case rested on circumstantial evidence, but none of the circumstances could be proved against any of the accused. It is settled law that if case rested on circumstantial evidence, the prosecution is required to prove the following aspects :

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.”

22 Thus, none of the links of the chain leads to the crime of the accused could be proved by the prosecution. From the evidence, it could not be concluded that prosecution was able to exclude every possible hypothesis of the innocence of the accused except the one and that the guilt of the accused. When no link of the chain could be established, it must be concluded that the chain of circumstantial evidence in the present case is not complete as to arrive at the conclusion that the accused and accused only committed the crime and that the circumstances were such as appeared inconsistent with the innocence of the accused.

23 All the more, this is an Appeal against the order of acquittal. The scope of the appeal against the order of acquittal is well defined. The order of the acquittal cannot ordinarily be interfered with even if the second legitimate view is possible from the same evidence recorded during the trial than the view taken by the Trial Court, unless and until, the appellate court comes to the conclusion that the findings of the trial court are perverse, manifestly erroneous, palpably wrong and demonstrably unsustainable. We do not find that the conclusions arrived at by the Trial Court are perverse, manifestly erroneous, palpably wrong and demonstrably unsustainable. In view of this

discussion, no interference is warranted in the judgment and order impugned in this Appeal and, hence, the following order :

“Appeal stands dismissed.”

(J. R. VORA, J.)

(SMT. ABHILASHA KUMARI, J.)

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